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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/709,234	11/09/2000	Jeffrey R. Boulter	85804-019401 (00-8832)	3098

76058 7590 01/09/2008
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EXAMINER

DENNISON, JERRY B

ART UNIT PAPER NUMBER

2143

MAIL DATE DELIVERY MODE

01/09/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/709,234

Applicant(s)

BOULTER ET AL.

Examiner

J. Bret Dennison

Art Unit

2143

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46 and 48 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46 and 48 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 10/22/2007.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application
- ☐ Other: _____.

DETAILED ACTION

1. This Action is in response to the Amendment for Application Number 09/709,234 received on 10/22/2007.

2. Claims 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46, and 48 are presented for examination.

Continued Examination Under 37 CFR 1.114

3. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 10/22/2007 has been entered.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

4. Claims 21, 23, 46, and 48 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

5. Claims 21, 23, 46, and 48 are directed towards an apparatus comprising a server. Applicant's Specification states that the invention may be implemented in

software and further provides an example of a server to include a java servlet.

Applicant's Specification recites, "A servlet is Java programming that runs as part of a network service, such as an HTTP server" [See Applicant's Specification, page 7, line 21 through page 8, line 2]. As such, the server of claims 21, 23, 46, and 48 may be implemented strictly in software. Therefore, claims 21 and 46 comprise subject matter that is nothing more than software.

Computer programs claimed as computer listings per se, i.e., the descriptions or expressions of the programs are not physical "things". They are neither computer components nor statutory processes, as they are not "acts" being performed. Such claimed computer programs do not define any structural and functional interrelationships between the computer program and other claimed elements of a computer, which permit the computer program's functionality to be realized.

M.P.E.P. 2601.1 Section I states, "Since a computer program is merely a set of instructions capable of being executed by a computer, the computer program itself is not a process and USPTO personnel should treat a claim for a computer program, without the computer-readable medium needed to realize the computer program's functionality, as nonstatutory functional descriptive material."

Claims 21, 23, 46, and 48 recite an apparatus comprising software. However there is no structure in the claim that allows the apparatus to be realized. As such, claims 21, 23, 46, and 48 are not limited to statutory subject matter and are therefore non-statutory.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

6. Claims 1-3, 5-7, 11-15, 17-18, 21, 24-26, 28-30, 35-39, 41-42, and 46 are rejected under 35 U.S.C. 102(e) as being anticipated by Hosken (U.S. 6,438,579).

7. Regarding claims 1 and 24, Hosken disclosed a method comprising:
accessing a database of data streams by at least one server (Hosken, col. 2, lines 33-34, "server system has access to a first database of media content items"; col. 4, lines 18-28, 40-45, Hosken disclosed the media content to be presented may be in the form of streaming, including tracks);

selecting at least one data stream for broadcast over a computer network to an individual user computer as a personalized internet radio station (Hosken, col. 2, line 39-40, "presenting media content items through a network connected interface to the user for review and consideration of potential personal interest", col. 2, lines 53-54, The content includes music), said at least one data stream being selected from said database according to a selection method performed by said at least one server to create a playlist of data streams (Hosken, col. 2, lines 45-51, "collecting the monitored data to develop a user weighted data set reflective of the user's relative consideration of the media content items), said selection method performed by said at least one server being influenced by input receivers from said individual user that comprises individual user preferences for data streams to be broadcast but not controlled by said individual user's input so as to prevent on-demand broadcast of data streams to said individual user (Hosken, col. 2, lines 45-51, "collecting the monitored data to develop a user weighted data set reflective of the user's relative consideration of the media content items; The server of Hosken filters and identifies media content based on the users feedback for "re-presentation", which clearly does not work like on-demand broadcasting, because the server is performing the selection based on user feedback);

transmitting said at least one selected data stream to said individual user computer from said at least one server via said network (Hosken, col. 2, lines 50-51, Hosken disclosed the newly selected media content being identified "for re-presentation to the user", lines 65-67, Hosken disclosed delivery of these recommendations that are particularly tailored to the personalized interests of the user);

receiving feedback via said network at said at least one server, said feedback expressing an individual user preference of said individual user regarding said transmitted at least one data stream (Hosken, col. 2, lines 42-47); and

updating said selection method using said individual user preference of said individual user (Hosken, col. 2, lines 45-51),

said updated selection method performed by said at least one server biases selection of data streams to be experienced at said individual user computer in accordance with said individual user preferences (col. 2, lines 29-32, Hosken disclosed the server providing recommendations to the user based on the users preferences, which means the content is biased according to the user's individual preferences) and limits said individual user's control over selection of particular data streams from said database to prevent on-demand broadcast of data streams (Hosken, col. 2, lines 65-67, Hoskens disclosed delivery of recommendations that are particularly tailored to the personalized interests of a user; Since they are recommendations, the user is clearly not able to use the system as an on-demand system).

Claim 24 includes a method with limitations that are substantially similar to the limitations of claim 1. Claim 24 also includes, "taking into account user input identifying those data streams that are to be excluded from being selected for transmission to said individual user computer." Hosken disclosed using "evaluating the user weighted data set in combination with the media content filter to identify a set of media content items accessible from the first database for re-presentation to the user". Therefore, Hoskens clearly disclosed filtering content based on user input. Such filtering of content must

include excluding media from the media set in order to tailor the recommendations to the personalized interests of the user. Therefore, claim 24 is rejected under the same rationale.

8. Regarding claims 2 and 25, Hosken disclosed the limitations as described in claims 1 and 24, including performing said selection method by said at least one server to select a plurality of data streams from said database to generate a playlist of data streams to be transmitted to said individual user computer (col. 2, lines 30-31, 35-45, Hosken disclosed a server system selecting media content and providing the media content to user; col. 4, lines 15-20, Hosken disclosed the media content to be presented may be in the form of streaming);

transmitting by said at least one server one data stream from said playlist of data streams to said individual user computer via said network (Hosken, col. 2, lines 39-42); and

performing said step of updating by said at least one server to update said playlist of data streams using said individual user preferences (Hosken, col. 2, lines 45-51, "re-presentation to the user").

9. Regarding claims 3 and 26, Hosken disclosed the limitations as described in claims 1 and 24, including receiving by said at least one server via said network feedback expressing preferences from sources other than the said individual user (Hosken, col. 4, lines 10-12, Hosken disclosed providing multiple users with the source

of recommendations; lines 44-46, Hosken disclosed the users providing profile information in order to provide individualizing recommendations for particular users; Therefore, multiple users provide feedback, i.e. users other than said individual user).

10. Regarding claims 5 and 28, Hosken disclosed the limitations as described in claims 1 and 24, including informing the said individual user generally regarding said database and said data streams (Hosken, col. 10, lines 39-42, Hosken disclosed that the user may be initially interviewed, surveyed, and variously questioned to obtain user interests in specific media content, which would require the server to provide information as to what it provides to its users, thereby allowing the user provide specific interests from what the server provides);

querying the said individual user as to initial individual user data stream preferences (Hosken, col. 10, lines 39-42, Hosken disclosed that the user may be initially interviewed, surveyed, and variously questioned to obtain user interests in specific media content) and then performing said step of selecting at least one data stream from said database to generate an initial transmission list of data streams, said initial transmission list being selected using said initial individual user preferences and said selection method (Hosken, col. 2, lines 40-45; col. 6, lines 6-18, Hosken disclosed directing production of a recommendation set based on the user's initial information).

11. Regarding claims 6 and 29, Hosken disclosed the limitations as described in claims 1 and 24, including wherein said data streams are selected from the group consisting of songs and videos (Hosken, col. 4, lines 20-28).

12. Regarding claims 7 and 30, Hosken disclosed the limitations as described in claims 2 and 25, including wherein said transmitted data stream is removed from said transmission list (Hosken, col. 2, lines 40-53, Hosken also disclosed presenting media content items to the user for review and consideration of potential personal interest and developing a user weighted data set reflective of the user's relative consideration of the media content items and evaluating the user weighted data set in combination with the media content filter to identify a set of media content items for re-presentation to the user; col. 2, lines 65-67, In order for the server to tailor the media content to the user's interest, it must remove any data streams that the user's ratings indicate that he/she dislikes the media content; col. 2, lines 48-51, Hosken indicates using a "media content filter", therefore the server clearly filters out songs the user indicates of no interest).

13. Regarding claims 11 and 35, Hosken disclosed a system comprising:
at least one server connected to a computer network (Hosken, col. 2, lines 30-32; Fig. 1A, Server System 18), said computer network connected to an individual the user computer (Hosken, col. 2, lines 39-43; Fig. 1A, User System 12);
a database of media content data streams, said database available to said computer network (Hosken, col. 2, lines 33-34, "a first database of media content

items"; col. 4, lines 18-28, 40-45, Hosken disclosed the media content may be in the form of data streams);

a data stream controller coupled to said at least one server, said data stream controller transmitting media content data streams to said individual user computer according to a selection program performed by the said at least one server to select data streams for broadcast over said computer network to said individual user computer (Hosken, col. 2, lines 34-51, Hosken disclosed the server selecting media content selected from the data base for transmission to the user);

said selection program used in selecting media content data streams for transmission to said individual user computer via said data stream controller (Hosken, col. 2, lines 45-51, Hosken disclosed the server "collecting the monitored data to develop a user weighted data set reflective of the user's relative consideration of the media content items), said selection program receiving feedback via said computer network indicating a preference corresponding to at least one of the media content data streams from the said individual user (Hosken, col. 2, lines 45-51, "collecting the monitored data to develop a user weighted data set reflective of the user's relative consideration of the media content items), said selection program performed by said at least one server being influenced but not controlled by said individual user preferences, said selection program using said individual user preferences to bias selection of data streams to be experienced at the said individual user computer and limiting the said individual user's control over selection of data streams from said database to prevent on-demand selection of a particular data stream by said individual user (Hosken, col. 2,

lines 65-67, Hosken disclosed delivery of recommendations that are particularly tailored to the personalized interests of a user; Since they are recommendations and the server is performing the selection based on user feedback, the user is clearly not able to use the system as an on-demand system).

Claim 35 includes limitations that are substantially similar to claim 11. Claim 35 also includes the limitation, "taking into account individual user input identifying those data streams that to be excluded from being selected for transmission to said individual user computer. Hosken also disclosed presenting media content items to the user for review and consideration of potential personal interest and developing a user weighted data set reflective of the user's relative consideration of the media content items and evaluating the user weighted data set in combination with the media content filter to identify a set of media content items for re-presentation to the user (Hosken, col. 2, lines 40-53). In order for the server to tailor the media content to the user's interest, it must remove any data streams that the user's ratings indicate that he/she dislikes the media content (Hosken, col. 2, lines 65-67). Hosken indicates using a "media content filter" (Hosken, col. 2, lines 48-51), therefore the server clearly filters out songs the user indicates of no interest. As such, the server clearly takes into account user input that identifies to the server that certain data streams should be excluded for "re-presentation." Therefore, claim 35 is rejected under the same rationale as claim 11.

14. Regarding claims 12 and 36, Hosken disclosed the limitations as described in claims 11 and 35, including wherein said computer network comprises the Internet (Hosken, col. 4, lines 30-35).

15. Regarding claims 13 and 37, Hosken disclosed the limitations as described in claims 11 and 35, including wherein said database is a song database and the data streams are songs (Hosken, col. 4, lines 20-25).

16. Regarding claims 14 and 38, Hosken disclosed the limitations as described in claims 11 and 35, including wherein said database is a music video database and the data streams are music videos (Hosken, col. 4, lines 20-25).

17. Regarding claims 15 and 39, Hosken disclosed the limitations as described in claims 11 and 35, including wherein said media content data streams are to be experienced via user interface comprises an electronic media player (Hosken, col. 4, lines 34-45).

18. Regarding claims 17 and 41, Hosken disclosed the limitations as described in claims 11 and 35, including wherein said selection program creates a playlist of data streams for transmission to said individual user (Hosken, col. 2, lines 49-50, "set of media content items" col. 4, lines 15-25, the media content could be streaming media, i.e. stream of song tracks).

19. Regarding claims 18 and 42, Hosken disclosed the limitations as described in claims 17 and 41, including wherein said selection program modifies said playlist of data streams for transmission to said individual user according to said individual user preferences (Hosken, col. 2, lines 45-51).

20. Regarding claims 21 and 46, Hosken disclosed an apparatus comprising:
at least one server (Fig. 1A, Server 18) configured to provide:

a rating tool, said rating tool receiving individual user preferences regarding one or more data streams played at an individual user computer by a media player (Hosken, col. 4, lines 34-45), said individual user preferences comprising said individual user's ratings associated with said one or more data streams (Hosken, col. 10, lines 20-37; col. 4, lines 15-20, Hosken disclosed the media content can be streams); and

a playlist generator, said playlist generator generating playlists identifying data streams to be experienced by an individual user using said media player (Hosken, col. 2, lines 30-40, Hosken disclosed the server selects media content to present to the user), said playlist generator selecting data streams for inclusion on said playlist according to said individual user preferences received from said individual user (Hosken, col. 2, lines 40-51, Hosken disclosed monitoring the users considerations to the media content and filtering content based on the user preferences and re-presenting the new media content data set to the user), said playlist generator biasing selection in

accordance with said individual user preferences and limiting said individual user's control over data stream selection to prevent on-demand selection of a data stream by said individual user (Hosken, col. 2, lines 65-67, Hosken disclosed delivery of recommendations that are particularly tailored to the personalized interests of a user; Since they are recommendations, the user is clearly not able to use the system as an on-demand system).

Claim 46 includes limitations that are substantially similar to claim 21. Claim 46 also includes the limitation, "taking into account individual user input identifying those data streams that to be excluded from being selected for transmission to said individual user computer. Hosken also disclosed presenting media content items to the user for review and consideration of potential personal interest and developing a user weighted data set reflective of the user's relative consideration of the media content items and evaluating the user weighted data set in combination with the media content filter to identify a set of media content items for re-presentation to the user (Hosken, col. 2, lines 40-53). In order for the server to tailor the media content to the user's interest, it must remove any data streams that the user's ratings indicate that he/she dislikes the media content (Hosken, col. 2, lines 65-67). Hosken indicates using a "media content filter" (Hosken, col. 2, lines 48-51), therefore the server clearly filters out songs the user indicates of no interest. As such, the server clearly takes into account user input that identifies to the server that certain data streams should be excluded for "re-presentation." Therefore, claim 46 is rejected under the same rationale as claim 21.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4, 8-9, 19, 23, 27, 31-32, 43, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hosken (U.S. 6,438,579).

21. Regarding claims 4 and 27, Hosken disclosed the limitations as described in claims 3 and 26, including wherein the step of receiving preferences from sources other than the said individual user further comprises receiving by said at least one server via said network feedback expressing preferences from other users (Hosken, col. 4, lines 44-53) and lists of popular songs (Hosken, col. 9, lines 40-45). Hosken also disclosed that obtaining feedback from externally generated polls, rankings and ratings of different media content items, the external sources including published reviews of significant new artistic works, current sponsorship programs, and advertising (Hosken, col. 9, lines 40-50).

Hosken did not explicitly state receiving feedback from commercial radio stations.

However, it was well known at the time the invention was made that commercial radio stations play a major role in the music industry by introducing new music to the public and receiving feedback from its listeners to determine which songs are popular and such.

Therefore it would have been obvious to one of ordinary skill in the art to receive feedback from commercial radio stations as an external source in order for the server to obtain feedback generated not only by the radio station itself, but also its fan-base, thereby more efficiently creating an "an expert weighting filter" (Hosken, col. 9, lines 50-52) and an "expert compiled database of content item relationship information" (Hosken, col. 4, lines 56-58).

22. Regarding claims 8 and 31, Hosken disclosed the limitations as described in claims 7 and 30.

Hosken also disclosed monitoring the user's consideration of the media content items and developing a user weighted data set (Hosken, col. 2, lines 42-47).

Hosken did not explicitly state wherein said data stream removed from said transmission list is listed on a transmitted data stream list.

However, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the system of Hosken to maintain a list of media content items that have been transmitted and wasn't of interest to the user in order for the system to maintain recommendations that are tailored to the user's interests (Hosken, col. 2, lines 65-67) rather than continually providing the same media content items and negating the user's interest in using the system as a whole.

23. Regarding claims 9, 19, 23, 32, 43 and 48, Hosken disclosed the limitations as described in claims 1, 11, 21, 24, 35 and 46. Hosken also disclosed a preferred

database suitable for use with the present invention owned by a subsidiary of Alliance Entertainment Corporation (Hosken, col. 5, lines 10-20). Hosken also disclosed purchase and delivery of the media content items (Hosken, col. 5, lines 40-41)..

Hosken did not explicitly state wherein said step of transmitting one of said data streams further comprises transmitting said one of said data streams selected by said selecting method, said selection method taking into account sound recording restrictions in data stream selection.

However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to take into account sound recording restrictions in data stream selections in order to comply with regulations regarding the broadcast of songs especially in the case of selling media content as indicated by Hosken, thereby rules and regulations for streaming media.

Response to Amendment

Applicant's arguments and amendments filed on 10/22/2007 have been carefully considered but they are not deemed fully persuasive. Applicant's arguments are deemed moot in view of the following new grounds of rejection as explained here below, necessitated by Applicant's substantial amendment (i.e., *by incorporating new limitations into the independent claims, which will require further search and consideration*) to the claims which significantly affected the scope thereof.

It is the Examiner's position that Applicant has not yet submitted claims drawn to limitations, which define the operation and apparatus of Applicant's disclosed invention in manner, which distinguishes over the prior art.

Failure for Applicant to significantly narrow definition/scope of the claims and supply arguments commensurate in scope with the claims implies the Applicant intends broad interpretation be given to the claims. The Examiner has interpreted the claims with scope parallel to the Applicant in the response and reiterates the need for the Applicant to more clearly and distinctly define the claimed invention.

Conclusion

Examiner's Note: Examiner has cited particular columns and line numbers in the references applied to the claims above for the convenience of the applicant. Although the specified citations are representative of the teachings of the art and are applied to specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested from the applicant in preparing responses, to fully consider the references in entirety as potentially teaching all or part of the claimed invention, as well as the context of the passage as taught by the prior art or disclosed by the Examiner.

In the case of amending the claimed invention, Applicant is respectfully requested to indicate the portion(s) of the specification which dictate(s) the structure relied on for proper interpretation and also to verify and ascertain the metes and bounds of the claimed invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to J. Bret Dennison whose telephone number is (571) 272-3910. The examiner can normally be reached on M-F 8:30am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan Flynn can be reached on (571) 272-1915. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



J. Bret Dennison
Patent Examiner
Art Unit 2143